

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY CHRISTOPHER KANARAS,

Defendant-Appellant.

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UNPUBLISHED

March 18, 2003

No. 237817

Oakland Circuit Court

LC No. 00-170280-FH

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of and sentence for probation violation. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty of first-degree retail fraud, MCL 750.356c. The trial court sentenced defendant as a fourth habitual offender to one year in jail and eighteen months' probation. The balance of defendant's jail term was to be suspended upon his completion of an inpatient substance abuse treatment program. As conditions of his probation defendant was required to refrain from criminal activity, refrain from using controlled substances, participate in outpatient substance abuse counseling, make truthful reports to his probation officer, maintain employment, and pay costs and fees. Defendant successfully completed Community Programs, Inc., an inpatient substance abuse treatment program. He was referred to two outpatient counseling programs, but did not successfully complete either program.

Subsequently defendant was charged with violating his probation by committing new criminal offenses, using controlled substances, failing to make a truthful report by failing to notify the probation department of the new criminal charges, failing to attend outpatient counseling, failing to maintain employment, and failing to pay costs and fees. At a hearing defendant offered to plead guilty to the charge that he failed to pay costs and fees, but disputed the other charges. The trial court indicated that it wished to hear from defendant's probation officer.

The probation officer testified that defendant tested positive for morphine on April 11, 2001 and July 25, 2001, that he failed to complete outpatient substance abuse counseling, that he was charged with the misdemeanor offenses of possession of drug paraphernalia and second-degree retail fraud, that he failed to pay costs and fees, and that he did not make a truthful report by disclosing that he had been charged with new criminal offenses. The probation officer

acknowledged that on a number of occasions defendant's positive drug screens were due to his ingestion of prescription medication. Defendant provided documentation for hospitalizations in February and July 2001, but not in April 2001. Defendant declined an opportunity to pay costs and fees by performing community service.

Defendant requested a continuance to secure the presence of physicians to testify regarding his hospitalizations and the medications he was prescribed, and to produce documentation that the pending charges were to be dismissed. The trial court denied defendant's request, noting that the hearing was scheduled for that date and that defendant should have been prepared to call witnesses and to present other evidence if he wished to do so.

The trial court found that defendant violated his probation by failing to participate in outpatient substance abuse counseling, by committing new offenses, by using controlled substances, and by failing to pay costs and fees. In imposing sentence the court noted that it was difficult to be compassionate when defendant kept committing new offenses. The trial court sentenced defendant to eighteen months to ten years in prison, with credit for fifteen days. Defendant received no credit for time spent in the inpatient substance abuse treatment program.

On appeal defendant argues he was entitled to a continuance, and the trial court's denial of his request rendered him unable to defend himself against the charges. We disagree. We review a trial court's decision to grant or deny a continuance for an abuse of discretion. A continuance should not be granted except for good cause shown. *People v Sekoian*, 169 Mich App 609, 613; 426 NW2d 412 (1988). To constitute reversible error, the denial of a continuance must be shown to have resulted in prejudice. *People v Pena*, 224 Mich App 650, 660-661; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885; 586 NW2d 925 (1998). When the probation violation hearing commenced defense counsel indicated that defendant was prepared to plead guilty of the charge that he failed to pay costs and fees, but he disputed the other charges. Defendant was entitled to present evidence to dispute these charges. MCR 6.445(E)(1). However, he has not shown good cause for his failure to be prepared to do so at the time set for the hearing. Defendant was aware of the nature of the charges against him, and could have been prepared to present evidence to defend himself against those charges. Defendant has not shown that good cause existed for a continuance, *Sekoian*, *supra*, and has not demonstrated that he was prejudiced by the trial court's refusal to grant a continuance. No reversible error occurred. *Pena*, *supra*.

Defendant argues the evidence was insufficient to support a finding that he violated his probation. We disagree. The prosecution had the burden of proving the charge of probation violation by a preponderance of the evidence. MCR 6.445(E)(1); *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992). The trial court found that defendant violated his probation by failing to participate in outpatient substance abuse counseling, by committing new offenses, by using controlled substances, and by failing to pay costs and fees. The evidence showed that after defendant completed the inpatient substance abuse treatment program his probation officer referred him to two outpatient programs. He received the referrals prior to becoming ill in February 2001, but did not fully participate in or complete either program. No evidence showed that his failure to participate was due to illness.

The evidence showed that defendant had been charged with new offenses but did not establish that he committed the offenses, and thus was insufficient to allow a rational trier of fact

to find that defendant violated his probation by committing new offenses. *People v Pillar*, 233 Mich App 267, 269-270; 590 NW2d 622 (1998). However, this error was harmless in light of the fact that the evidence was sufficient to find that defendant violated his probation on several other grounds. The evidence supported the trial court's finding that defendant violated his probation by using the controlled substance morphine on or about April 11, 2001. Defendant did not meet his burden of producing evidence to support his defense that his use of morphine was authorized.

Finally, the evidence supported the trial court's finding that defendant violated his probation by failing to pay costs and fees. Defendant was offered the opportunity to pay costs and fees by doing community service, but he declined the offer. The trial court did not revoke defendant's probation based on his financial inability to pay costs and fees. *People v Gallagher*, 55 Mich App 613, 620; 223 NW2d 92 (1974). Viewed in a light most favorable to the prosecution, the evidence was sufficient to find that defendant violated his probation. *Reynolds, supra*.

Defendant argues he is entitled to resentencing because the trial court imposed a disproportionate sentence that was based on an improper finding that he was guilty of other offenses. We disagree. At sentencing, the trial court remarked it was difficult to have compassion for defendant when he continued to commit new offenses; however, the trial court did not make an improper independent finding that defendant committed the charged offenses of possession of drug paraphernalia and retail fraud. *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996). When probation is revoked and a defendant is sentenced for the underlying offense, it is as though the sentence of probation was never imposed. *People v Burks*, 220 Mich App 253, 258; 559 NW2d 357 (1996). The trial court based its sentence of eighteen months to ten years on defendant's extensive prior record, which at the time of the underlying offense consisted of seven felonies and three misdemeanors, and his failure to comply with the terms of his probation. Defendant's behavior indicated an unwillingness to conform his actions to the requirements of the law. His minimum term of imprisonment does not constitute an abuse of discretion. *People v Hardy*, 212 Mich App 318, 321; 537 NW2d 267 (1995).

Defendant argues he was entitled to credit for the time he spent in the inpatient substance abuse treatment program. We disagree. The double jeopardy clauses of the federal and state constitutions, US Const, Am V; Const 1963, art 1, § 15, require an award of credit for time spent in jail as a condition of probation when the defendant is later sentenced to prison upon revocation of probation. *People v Wagner*, 193 Mich App 679, 682; 485 NW2d 133 (1992); MCL 769.11b. Sentence credit is required only for confinement amounting to time spent "in jail" as that term is commonly understood and used. The purpose of the confinement must be incarceration rather than treatment and rehabilitation. *People v Whiteside*, 437 Mich 188, 202; 468 NW2d 504 (1991). The purpose of a rehabilitation center is treatment rather than incarceration. *People v Scott*, 216 Mich App 196, 199-200; 548 NW2d 678 (1996). Defendant was not entitled to credit for the time he spent in the residential treatment program because he did not spend that time in jail. *Whiteside, supra*.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Janet T. Neff  
/s/ Hilda R. Gage